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SUGHRUE MION, PLLC				
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EXAMINER				
MACARTHUR, VICTOR L				
ART UNIT		PAPER NUMBER		
3679				
NOTIFICATION DATE		DELIVERY MODE		
05/13/2010		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

sughrue@sughrue.com
PPROCESSING@SUGHRUE.COM
USPTO@SUGHRUE.COM

Office Action Summary

Application No.

10/525,705

Applicant(s)

MATHES ET AL.

Examiner

VICTOR MACARTHUR

Art Unit

3679

Period for Reply -- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 16 February 2010.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-17, 19 and 20 is/are pending in the application.
- 4a) Of the above claim(s) 10, 19 and 20 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-9 and 11-17 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
- Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB-06)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

DETAILED ACTION

Restriction

Claim 10 remains withdrawn from further consideration pursuant to 37 CFR 1.142(b) as being drawn to a nonelected invention, there being no allowable generic or linking claim. Election was made **without** traverse in the reply filed on March 24, 2008.

Newly submitted claims 19 and 20 are directed to an invention that is independent or distinct from the invention originally claimed for the following reasons:

- The originally presented fastener system (claims 1-9 and 11-17) and the newly presented method of fastening a vacuum pump (claims 19 and 20) are related as product and process of use.
- The inventions are distinct since the claim 19 process can be practiced with a product materially different from that of claim 1, for example, a fastener system using headless set screws (i.e., rather than the "screws having heads" recited in claim 1).
- Lastly regarding lack of unity, note that which is common between product and method is old in the art as detailed in the prior art rejections below.

Since applicant has received an action on the merits for the originally presented invention, this invention has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 19 and 20 are withdrawn from consideration in addition to claim 10 (previously withdrawn) as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Claim Objections

Claim 1 is objected to because of the following informalities:

- regarding claim 1, “screws (17) pass” in line 9 should be --the screws (17) pass--;

Appropriate correction is required. For purposes of examining the instant invention, the examiner has assumed these corrections have been made.

Claim Rejections - 35 USC § 112

The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 11-17 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

The recitation “a gap in which the shank is bendable without breaking” (lines 11-12 of claim 11) is not supported in the disclosure. The limitation as written implies that the shank is not breakable in the gap. This is contrary to applicant's original disclosure. Note that the written description (p.3, ll.29-35) states “avoids the fastener screws rupturing... **in the event of the rotor bursting** while rotating at full speed... the risk of rupturing **is reduced**”. Note that the written description (p.4, ll.22-23) states “for the shank of the screw to bend”. Note that the new Figure 6 shows the shank of the screw 17 bent. However, this does not imply that the shank will not

break under any stress especially not across the entire gap as claimed. In fact the written description recitation (p.3, ll.29-35) noted above states that the shank in fact can rupture albeit with a "reduced risk". There is no support for bending through the gap without breaking.

The examiner suggests amending the claims to contain only what the original disclosure gives support for. Take for instance the following:

- A limitation of --said fastener screws adapted not to rupture in the event of a rotor bursting while rotating at full speed-- would find antecedent basis on p.3, ll.29-32.
- A limitation of --A gap providing the shank an amount of space for multidirectional deformation in bending to reduce risk of the screw shank rupturing-- would find antecedent basis on p.3, l.33 - p.4, l.2.
- A limitation of --the shank being bendable when the hole is offset laterally relative to the tapped hole in response to shear forces-- would find antecedent basis in lines 21-24 of p.4.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-9 and 11-17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Szczukowski USPN 6280132 in view of Yamashita USPN 6705830 and Mitsubishi Heavy Ind Ltd JP08114196.

Szczukowski discloses applicant's fastener system structure including a flange (40), a through hole (41), a screw (10) having a head (head of 10) and shank (shank of 10), wherein the through hole comprises a cylindrical distal segment (small portion of bore within 42), an enlarged cylindrical proximal segment (large bore at bottom of 41) wherein the shank passes through a distal segment first then passes through said proximal segment. Szczukowski does not expressly state that the flange is annular, nor does Szczukowski expressly limit the intended use of the fastener system to any specific usage. However:

- Yamashita teaches that a flange (20) should be annular in shape having a plurality of screws about its circumference for the benefit of using the flange to connect an annular vacuum pump (1). Therefore, it would have been obvious to one with ordinary skill in the art at the time the invention was made to ensure that the Szczukowski flange was annular and had a plurality of screws about its circumference for the benefit of utility with an annular vacuum pump.

As detailed above, the resulting prior art structure is substantially identical to the claimed structure such that the PTO must presume claimed functions/properties ("to bend", "to offset laterally in response to shear forces", etc.) to be inherent, thus presenting a *prima facie* case and properly shifting the burden to prove otherwise with evidence to the applicant. It is fairly the applicant's burden to obtain and test the prior art since the Patent Office is unable to manufacture or obtain prior art products. Mere allegation that the prior art does not inherently possess capability to perform applicant's claimed functions/properties is not sufficient without actual evidence proving as much. The MPEP sections and case law below clearly set forth that that product claims are limited by structure and that functional/property limitations only limit a claim

in so far as they require further specific structure. One cannot obtain patentability for a product structure by merely reciting an intended functional use thereof; at least not without testing structurally similar prior art structures and providing evidence proving incapability of such intended functional use thereof. The burden of such testing lies fairly with the applicant since it is applicant, not the PTO, who is endeavored in the making and using of products. Note the following:

- MPEP §2112.01 (I);
- MPEP §2114;
- *Ex parte Masham*, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987);
- *In re Ludtke*, 441 F.2d 660, 664, 169 USPQ 563, 566 (CCPA 1971);
- *In re Brown*, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972);
- *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977);
- *In re Schreiber*, 128 F.3d 1473, 1478 44 USPQ2d 1429, 1432 (Fed.Cir.1997);
- *Hewlett-Packard Co. v. Bausch & Long Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990);
- *In re Swinehart*, 58 CCPA --, --F.2d --, 169 USPQ 226 (1971);
- *In re King*, 801 F.2d 1324, 1327, 231 USPQ 136, 138 (Fed. Cir. 1986);
- *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed.Cir. 1990);
- *In re Schulze*, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965).

Even if, for the sake of argument, the resulting modification were not inherently capable of performing applicant's claimed functional intended use, it would have been obvious to one of ordinary skill in the art at the time the invention was made to further modify the assembly to be

capable of such function/property in view of the desirability of allowing for bending of screws to better prevent flange disconnection as set forth in Mitsubishi Heavy Ind Ltd JP08114196.

Regarding the dependent claims note that the transition from the large cylindrical portion of the bore to the small cylindrical portion of Szczukowski is frusta-conical. Also note the following:

- MPEP 2144 clearly states that "The rationale to modify or combine the prior art does not have to be expressly stated in the prior art; the rationale may be expressly or impliedly contained in the prior art or it may be reasoned from knowledge generally available to one of ordinary skill in the art, established scientific principles, or **legal precedent established by prior case law**" (emphasis added).
- It has generally been recognized that the optimization of proportions in a prior art device is a design consideration within the skill of the art. *In re Reese*, 290 F.2d 839, 129 USPQ 402 (CCPA 1961).
- MPEP 2144.04(IV)(A) details that changes in size and/or proportion have been established by case law to be obvious where there is no unexpected result (criticality) citing *In re Rose*, 220 F.2d 459, 105 USPQ 237 (CCPA 1955), *In re Rinehart*, 531 F.2d 1048, 189 USPQ 143 (CCPA 1976), and *In re Gardner v. TEC Systems, Inc.*, 725 F.2d 1338 220 USPQ &&& (Fed. Cir. 1984), *cert. denied*, 469 U.S.830, 225 USPQ 232 (1984).

- MPEP 2144.04(IV)(B) details that changes in shape have been established by case law to be obvious where there is no unexpected result (criticality) citing *In re Dailey*, 357 F.2d 669, 149 USPQ 47 (CCPA 1966)
- MPEP 2144.04(VI)(A) details that reversal of parts is obvious unless there is some unexpected result (criticality) citing *In re Gasda*, 219 F.2d 449, 104 USPQ 400 (CCPA 1955).
- MPEP 2144.04(VI)(B) details that duplication of parts has been established by case law to be obvious where there is no unexpected result (criticality) citing *In re Harza*, 274 F.2d 669, 124 USPQ 378 (CCPA 1960),
- MPEP 2144.04(VI)(C) details that rearrangement of parts has been established by case law to be obvious where there is no unexpected result (criticality) citing *In re Japikse*, 181 F.2d 1019, 86 USPQ 70 (CCPA 1950), *In re Kuhle*, 526 Fx2d 553, 188 USPQ 7 (CCPA 1975).
- MPEP 2144.04 states "**If the applicant has demonstrated the criticality** of a specific limitation, it would not be appropriate to rely solely on case law as the rationale to support an obviousness rejection" (emphasis added). However, applicant's disclosure, and all other evidence of record, fails to set forth any unexpected result due to any specific shape, proportion, arrangement etc. over any other. Accordingly, the dependant claim limitations lack any criticality such that a rejection based solely on case law is appropriate.
- Note that MPEP 716.01(c)(II) states that "The arguments of counsel cannot take the place of evidence in the record". Note that MPEP 716.02 states "Evidence must show

unexpected results... burden on applicant to establish results are unexpected and significant... applicants have burden of explaining proffered data... expected beneficial results are evidence of obviousness”.

- “[T]he results of **ordinary innovation** are not the subject of exclusive rights under the patent laws. Were it otherwise patents might stifle, rather than promote, the progress of useful arts. See U.S. Const., Art. I, section 8, cl.8.” In re KSR International Co. v. Teleflex Inc., 82 USPQ2d 1385 (U.S. 2007) (emphasis added). Accordingly, changing a trivial detail of the prior art is at best an “ordinary innovation” if any innovation at all, and therefore does not constitute sufficient reason for patentability.
- Therefore, it would have been obvious to one with ordinary skill in the art at the time the invention was made to optimize proportions, shape, arrangement, etc. since the specific limitations lack any criticality (lacks any unexpected result as detailed above) and in accordance with the rational set forth in the MPEP sections and case law noted above.

Response to Arguments

Applicants' arguments filed 2/16/2010 have been fully considered but they are not persuasive.

Regarding the 35 U.S.C. 112 1st paragraph new matter rejections, applicant argues that the written description (p.3, ll.29-30, p.4, ll.22-23) provide antecedent basis for the claim limitation “a gap in which the shank is bendable without breaking” (lines 11-12 of claim 11).

This is not persuasive. The written description states “avoids the fastener screws rupturing... in the event of the rotor bursting while rotating at full speed... the risk of rupturing is reduced” (p.3, ll.29-35) and “for the shank of the screw to bend” (p.4, ll.22-23). This does not constitute antecedent basis for what is recited in the claim. In fact the written description recitation (p.3, ll.29-35) noted above states that the shank can rupture albeit with a “reduced risk”. There is no support for bending through the gap without breaking. The examiner suggests amending the claims to contain only what the original disclosure gives support for such as a limitation of --said fastener screws adapted not to rupture in the event of a rotor bursting while rotating at full speed--, which would find antecedent basis on p.3, ll.29-32, or a limitation of --A gap providing the shank an amount of space for multidirectional deformation in bending to reduce risk of the screw shank rupturing--, which would find antecedent basis on p.3, l.33 - p.4, l.2, or a limitation of --the shank being bendable when the hole is offset laterally relative to the tapped hole in response to shear forces--, which would find antecedent basis in lines 21-24 of p.4.

Regarding the prior art rejections, applicant cites Federal Circuit case *Gemtron Corp. v. Saint-Gobain Corp.*, 91 USPQ2d 1409 (Fed. Cir. 2009) argues by implication that functional limitations, such as applicants, must be treated as structural limitations in view of *Gemtron*. This is not persuasive. Firstly, applicant has failed to supply any copy of the argued case law. Secondly, according to applicant’s argument, the claimed invention in *Gemtron* was drawn to a product refrigerator shelf comprising a frame and piece of glass such that the glass and frame structurally limit the shelf. Conversely, applicant’s elected invention of the current application is drawn to “A fastener system for fastening a vacuum pump” (emphasis added) such that the vacuum pump is a mere functional intended use for the claimed fastener system product. That is

to say that applicant seeks protection to prevent others from making/selling the claimed fasting system regardless of whether or not others also make/sell a vacuum pump. Accordingly, the case law, atleast as argued by applicant, is not applicable to applicant's situation. If applicant wishes to narrow the scope of the claimed invention to be drawn to a combination of --A fastener and vacuum pump system comprising: a fastener and vacuum pump" then a continuation must be filed with such claims. Applicant has failed to identify any structure present in the prior art preventing the art from being capable of performing the function "to bend", nor has applicant identified any specific structure lacking in the prior art necessary for capability to perform the function. Applicant has failed to obtain or test the prior art fastener systems, much less submit evidence that the prior art fastener systems are incapable of performing the functional intended use "for fastening a vacuum pump". Furthermore, applicant's cited case law does not negate or detract from MPEP 2112.01 and 2114, or the binding case law from which those sections are derived. Note the following:

- MPEP §2112.01 (I) states "When the structure recited in the reference is substantially identical to that of the claims, claimed properties or functions are presumed to be inherent... [and] a *prima facie* case of either anticipation or obviousness has been established" (emphasis added);
- MPEP §2114 states "Apparatus claims must be structurally distinguishable from the prior art... [and the] Manner of operating the device does not differentiate apparatus claim from the prior art... [and a] claim containing a 'recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from the prior art apparatus' if the prior art

apparatus teaches all the structural limitations of the claim. *Ex parte Masham*, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987)” (emphasis in original).

- “Where, as here, the claimed and prior art products are identical or substantially identical, or are produced by identical or substantially identical processes, the PTO can require an applicant to prove that the prior art products do not necessarily or inherently possess the characteristics of his claimed product. See *In re Ludke*, *supra*. Whether the rejection is based on ‘Inherency’ under 35 USC 102, on ‘*prima facie* obviousness’ under 35 USC 103, jointly or alternatively, the burden of proof is the same, and its fairness is evidenced by the PTO’s inability to manufacture products or to obtain and compare prior art products. See *In re Brown*, 59 CCPA 1036, 459 F.2d 531, 173 USPQ 685 (1972)” (emphasis added) *In re Best*, 562 F.2d 1252, 1255, 195 USPQ 430, 433-34 (CCPA 1977);
- “Apparatus must be distinguished from the prior art in terms of structure rather than function.” *In re Schreiber*, 128 F.3d 1473, 1477-78 44 USPQ2d 1429, 1431-32 (Fed.Cir.1997)
- “Apparatus claims cover what a device is, not what a device does.” See *Hewlett-Packard Co. v. Bausch & Long Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1528 (Fed. Cir. 1990)
- “[I]t is elementary that the mere recitation of a newly discovered function or property, inherently possessed by things in the prior art, does not cause a claim drawn to those things to distinguish over the prior art. Additionally, where the Patent Office has reason to believe that a functional limitation asserted to be critical for establishing

novelty in the claimed subject matter may, in fact, be an inherent characteristic of the prior art, it possesses the authority to require the applicant to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on.” (emphasis added) *In re Swinehart*, 58 CCPA --, --F.2d --, 169 USPQ 226 (1971), and *In re Ludtke*, 441 F.2d 660, 664, 169 USPQ 563, 566 (CCPA 1971);

- “[I]t is the patentability of the product claimed and not of the recited process steps which must be established. We are therefore of the opinion that when the prior art discloses a product which reasonably appears to be either identical with or only slightly different than a product claimed in a product-by-process claim, a rejection based alternatively on either section 102 or section 103 of the statute is eminently fair and acceptable. As a practical matter, the Patent Office is not equipped to manufacture products by the myriad of processes put before it and then obtain prior art products and make physical comparisons therewith.” (emphasis added) *In re Brown*, 459 F.2d 531, 535, 173 USPQ 685, 688 (CCPA 1972);
- "Contrary to appellant's reasoning, after the PTO establishes a *prima facie* case of anticipation based on inherency, the burden shifts to appellant to prove that the subject matter shown to be in the prior art does not possess the characteristic relied on... Here, appellant's burden before the board was to prove that Donley's structure does not perform the so-called method defined in the claims when placed in ambient light. Appellant did not satisfy that burden, it did not suffice merely to assert that Donley does not inherently achieve enhanced color through interference effects, challenging the PTO to prove the contrary by experiment or otherwise. The PTO is

not equipped to perform such tasks.” *In re King*, 801 F.2d 1324, 1327, 231 USPQ 136, 138 (Fed. Cir. 1986);

- “Spada was reasonably required to show that his polymer compositions are different from those described by Smith. This burden was not met by simply including the assertedly different properties in the claims. When the claimed compositions are not novel they are not rendered patentable by recitation of properties, whether or not these properties are shown or suggested in the prior art.” *In re Spada*, 911 F.2d 705, 709, 15 USPQ2d 1655, 1658 (Fed. Cir. 1990).
- MPEP §716.01(c)(II) states “The arguments of counsel cannot take the place of evidence in the record. *In re Schulze*, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965).”

Applicant's remaining arguments with respect to the claims have been considered but are moot in view of the new grounds of rejection.

Conclusion

Applicant's amendment (i.e., amendments to claims 1 and 11) necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period

will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Victor MacArthur whose telephone number is (571) 272-7085. The examiner can normally be reached on 8:30am - 5:00pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Daniel P. Stodola can be reached on (571) 272-7087. The fax phone number for the organization where this application or proceeding is assigned is (571) 273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197.

May 12, 2010

/Victor MacArthur/
Primary Examiner, Art Unit 3679